of the Tribunals, as well as by the Maltese Lawyers practising in that court, to put things right wherever justice and equity so required. Many illustrious Maltese lawyers such as Chapelle, Bonavita, Torregiani, Calcedonio Debono and Giovanni Nicolò Zammit took part in its proceedings. The Magistrato, or the later Tribunale, was a true and proper prize court administering the law of nations as then already acknowledged by enlightened international legal opinion, and especially as recognised by the relevant provisions of the Code de Rohan. The records of the corsair courts of Malta, if we may call them so, are still excellently preserved in local archives. They provide reliable evidence of the understanding and appreciation of this branch of the law in Malta even in those far off, swashbuckling times.

DOCTORS AND WOULD-BE DOCTORS IN THE LAW REPORTS

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DOCTORS (and, following the order in the title of this lecture, I shall come to would-be doctors later) figure in our law reports in several guises – as plaintiffs or defendants in civil actions, as persons charged in criminal actions, as witnesses and, lastly and more commonly, as experts. For the purposes of this lecture, I am confining my interest to doctors *qua* doctors as otherwise there are, of course, numerous instances of doctors figuring in the law reports as ordinary litigants. Obviously there is nothing to preclude doctors from joining in this national pastime which is court litigation and, as I said, there are several reported cases of doctors, even some of the most reputable ones, suing or being sued for damages in connection with traffic accidents, whereas in relation to traffic accidents I am obviously more concerned with doctors as experts

assessing, for instance, (and this is by no means easy) the percentage of an injured person's permanent incapacity for the purposes of an action for damages.

I should like to start with a famous civil case in which a doctor unfortunately figures as defendant and I should like to do so because the case is concemed with the fundamental question of a doctor's responsibility arising out of the carrying out of his professional duties. The case, which is in the Law Reports (Vol. XXXV, Part 2, pages 55-56), was decided by the Court of Appeal on the 2nd April 1951. In this case a father, on behalf of his son under age, sued a doctor for damages arising out of the fact that the son, who was under the professional care of the doctor, allegedly through the doctor's negligence, lost his foot and suffered permanent debilitation. Warrants of seizure and of impediment of departure, as well as a garnishee order, were also issued against the doctor.

The facts of the case were as follows. On the 18th March 1944 the doctor performed an operation on the boy's foot, which had been paralysed through poliomyelitis. Next day the doctor visited the patient and, as he stated in evidence, found everything normal. He failed to visit him on the 20th but on the 21st he did visit him, after having first declined, on the insistence of the person who called him and he found the boy flushed and feverish. Again on the 22nd he failed to see the boy and on the 23rd the boy's mother took him to the doctor's house. The doctor tore open the bandage and, after some medication, applied another bandage on everything there was. On the 25th the boy's mother again went to the doctor and informed him that the exposed part of one of the toes there was a blister. Notwithstanding this information, the doctor failed to go and see the boy. From the 26th onwards the mother started taking the boy to the doctor daily and the doctor continued to treat him regularly till August of the same year when the boy's foot, gangrenous and mummified, dropped off spontaneously as Professor Peter Paul Debono, to whom the boy's family had turned, was uncovering it. The medical experts appointed by the Court reached the conclusion in their report that the gangrenous process had begun from one to two days after the operation, that is to say between the 19th and 20th March, and continued on its normal course till the foot's spontaneous amputation four months later and that the position could have been remedied had the doctor become aware of it in time. They said that in this case gangrene was occasioned by the

pressure of the plaster bandage, which seriously obstructed the circulation, added that it was to be expected that after such an operation the foot should swell and the bandage consequently tighten. They admitted that the doctor had not noticed the condition of the boy's foot in those first days after the operation, but felt that this was due to a professional error of judgment, an error in the interpretation of clinical facts, and that this error was not due to negligence.

Both the court of first instance and the Court of Appeal, however, disagreed with the experts' conclusion that there was no negligence, and this on the basis of the statements of the experts themselves. It was remarked in the judgment that, according to the experts themselves, the critical period was between the 19th and the 23rd and during this period the doctor had failed to see the patient on the 20th and the 22nd, and it was only on the insistence of a certain person that he went to see him on the 21st. The experts themselves stated in their evidence that common prudence did in fact suggest that the doctor should have seen the boy also on the 20th and added that in the period between the 20th and the 23rd the doctor should have gone to see the boy irrespective of any symptomatology which the boy presented on the 20th, but by reason only of the fact that the operation had taken place on the 18th, considering the nature of the operation itself. The experts themselves also stated that in this period between the 20th and the 23rd the symptoms, especially local ones, increased in severity and this should have caused the doctor to become aware of the gangrenous process, had he in fact gone to see his patient. Indeed, as I said, it was on the basis of the experts' findings themselves that both Courts reached the clear conclusion that there had been negligence on the part of the doctor.

The Court of Appeal agreed with the Court below that on the facts as established the doctor had not used the diligence of a *bonus paterfamilias* and had shown imprudence in not having continually kept, as he should have done, an eye on the patient in the days after the operation when the danger of gangrene was so much present and could have been avoided by his attention. He was thus at fault and was responsible for the consequences.

The Court of Appeal, quoting from Italian and French text-writers, held that it was clear from the authorities and the decided cases that a doctor was not responsible for damages resulting from an excusable professional error and this was excusable if it stem-

med from the uncertainties and imperfections of the sciences and not from negligence or sheer incapacity. But the position was, of course, different if the error was, as the Court put it, *grossolano*, which, literally translated, means 'coarse', or if the damage was attributable to his not showing the prudence, diligence and attention of a *bonus paterfamilias*, which, as you know, is the ordinary standard of care required by our law. This proposition, as indeed also the writ of summons itself, was based on the basic provisions of Sections 1074 and 1075 of the Civil Code, which provide that 'every person... shall be liable for the damage which occurs through his fault' and that 'a person shall be deemed to be at fault if, in his own acts, he does not use the prudence, diligence and attention of a *bonus paterfamilias* but 'no person shall, in the absence of an express provision of the law, be liable for any damage caused by want of prudence, diligence of attention in a higher degree'.

Another class of reported cases in which doctors figure, this time as plaintiffs, in civil suits and which illustrate the eternal hazards of credit, relate to doctors' actions for the payment of professional fees. First of all, as you know, there is prescription, which is here used not as a medical term but as a Maltese and Continental legal term denoting one of the causes of extinction of obligations (by lapse of time) which is in general justified by the social necessity of ensuring the certainty of juridical relationships, but – and I quite realize this – can be also most infuriating. On the other hand, the running of prescriptive time may in some cases be suspended or interrupted. Procedurally prescription is a defence against an action and in civil matters cannot be raised by the Court of its own motion, but unfortunately is quite often cheerfully raised by the defendant, and this at any stage of the proceedings, even on appeal. One of the facts of life of universal application is that there is very little enthusiasm for payment, at least when one is at the paying end. No doubt you all know that, according to law, actions by physicians, surgeons and obstetricians to get payment for their visits or operations are barred by the lapse of two years. So please beware.

I am now thinking of one particular doctor (whose case, decided by the First Hall of the Civil Court in 1928, figures in Vol. XXVII, Part 2 pages 53-55 of the Law Reports) who must have found the defence that was set up against his action for the payment of professional fees perhaps much more disconcerting than just prescrip-

tion. The patient, defendant in the suit, did not contest the fact that he had called the doctor to make use of his professional services, nor indeed did he contest the bill. His defence was only that the treatment which the doctor had given him, notwithstanding the doctor's repeated assurances that it would have been efficacious, had not produced the anticipated effect and that in fact he was worse. He added that he would not have entrusted his case to the doctor if he had not assured him about the result of the treatment, and in fact he had told the doctor not to start the treatment if he did not feel certain of its efficacy. It was established that the treatment had negative results and Professor Peter Paul Debono expressed the opinion that the patient's illness was incurable.

The Court in this delicate case had regard to the relevant circumstances. It held that it was clear that the payment of a doctor's professional fees could not be subjected to the condition of the patient's recovery, notwithstanding the doctor's assurances and expressions of confidence in the result of the treatment which, rightly or wrongly, he thought would be conducive to recovery, provided – and this is a very important proviso – there was no evident bad faith or evident abuse of the exercise of his profession on the part of the doctor. In this case, bad faith, the Court said, 'could not be presumed solely from the negative result of the treatment or Professor Debono's opinion that the patient's illness was incurable'. The case was, of course, decided on its own merits, due allowance being made for the possibility in other circumstances of the presence of bad faith or abuse in the exercise of the profession, and this is quite understandable.

As I said, the Law Reports also show some interesting cases of doctors as defendants in criminal cases. I should like in the first place to refer to a reported case decided in 1917 which concerned a charge against a Sliema doctor of having refused to give his professional services when called upon so to do in an urgent case and which indeed relates to what is often an agonizing situation for a medical practitioner (Law Reports, Vol. XXIII, Part 1, pages 1083-1086). As you know, the Medical and Kindred Professions Ordinance (Chap. 51) provides in section 6 that it is the duty of every licensed medical practitioner to practise his profession whenever he is so required in cases of urgency, whether by day or by night, and without any wilful delay to render his aid and prescribe the necessary remedies. The Ordinance also prescribes penalties for offences against this provision.

The facts of this particular case were as follows. In the early hours of the 19th August 1917 a man was roused from his slumbers by a kind-hearted woman who told him that another woman, a neighbour, was ill and she asked for his help. He found the sick woman so ill that he called a priest and the priest suggested that he should call a doctor. He then embarked on a series of fruitless peregrinations. Having gone first to one doctor with negative result, he then went to the doctor concerned in this case, making known to the person who peeped out of the window the object of his visit and the urgency of the case, but was informed by that person that the doctor could not attend to the case as he had only shortly come home. After having unsuccessfully sought another doctor at his residence and also unsuccessfully requested the address of another from the duty police officer, the man went again to the doctor concerned, but again with negative results. Then he went, again unsuccessfully, to call another doctor. The net result was that up to six o'clock in the morning no doctor had gone to see this woman. In court the doctor concerned pleaded in justification indisposition resulting from tiredness which necessitated rest. The Court of Magistrates held that, according to the teachings of jurists, the reason justifying a doctor's refusal to give his professional services when so required in cases of urgency had to be grave, and that not only had this doctor failed to show sufficient justification for his refusal, but the evidence showed that his defence was groundless. On appeal by the doctor, the appellate Court affirmed the judgment. It observed that the conditions for the existence of the contravention in question were, first, the urgency of the case in connection with which a licensed doctor is required to give his professional services and, secondly, the unreasonableness of his refusal to do so. The Court added that one could only adjudicate upon the urgency of the request on the basis of the circumstances antecedent to or concomitant with the request itself, that is to say on the basis of the circumstances in which the case presented itself and not of the subsequent circumstances; these might conceivably disclose that the apprehended urgency did not as such exist whereas it could be shown that the circumstances themselves did in fact justify at the time the apprehension of that urgency. With regard to the second point, the Court said that, in order to decide on the reasonableness or otherwise of the doctor's refusal, it was necessary to have regard to the ground for the refusal, the ascertainment of the existence of such ground and its appreciation being left to the Court.

Quoting from the French legal writers Chauveau and Helie, the Court made it clear that the assessment of such ground could not indeed be left to the individual appreciation of the practitioner to whom the request was made. Obviously this is a very delicate matter involving a fine appreciation of all relevant factors.

Other reported cases in this class relate to another important duty of medical practitioners under the Prevention of Disease Ordinance (Chap. 59). Section 5 of this Ordinance provides as follows: *Every* medical practitioner attending on or called in to visit a patient shall forthwith, on becoming aware that the patient is suffering from a disease to which this part of the Ordinance applies, send to the Superintendent a certificate stating the name, age and address of the patient, and the disease from which, in the opinion of such medical practitioner, the patient is suffering'. This provision, according to Section 38 of the same Ordinance with which it must be read, applies even where there exists only a reasonable suspicion that the disease is one of those specified in the said Section 38. A cade of a charge under this Ordinance against a medical practitioner came before the Court of Magistrates in 1938. It did not present much difficulty from the evidential point of view. In this case, reported in Vol. XXX, Part 1, pages 543-549 of the Law Reports, it was established in evidence that the doctor, who had a sick child under his care, actually declared to the child's mother that the case was one of diphtheria, gave the child several injections of anti-diphtheria serum, warned the child's parents to say nothing about case, created in them the fear that they would be arrested if they talked and stating that if he was caught he would be fined twenty pounds, asked them to hide the empty phials, advised them to remove their young daughter from the house, warned them not to admit anybody into the house and, notwithstanding all this, sent no certificate to the Sanitary Authorities and then expected to get away with it in Court. It is not surprising in the circumstances that when he took the witness stand he only made his position worse.

The case is interesting only because it involved an important question about prescription. We have seen that prescription, as a cause of extinction of civil obligations is not too friendly to the medical practitioner who is a little remiss in sending his bills. But in a criminal case, on the other hand, prescription can only operate in favour of the person charged, in this case the medical practitioner concerned. The Court of Magistrates accepted the doctor's plea,

as it held that the doctor had declared the child to be suffering from diphtheria on the 20th December 1937 and the summons had been served on him on the 22nd March 1938, that is to say more than three months after the commission of the contravention. As in such cases the prescriptive period is 3 months the criminal action was thus barred by prescription and the doctor was acquitted. On appeal by the Attorney-General, however, the appellate Court reversed the judgment, found the doctor guilty and fined him. It held that the offence in question was a continuing one, that is to say one in which the course of action continues *de die diem,* and in such cases the prescriptive period only commences to run on the day when the violation of the law ceases. In this case the appellate Court held that the permanence of the anti-juridical state ceased with the child's death, so as long as the child remained alive the doctor was still violating the law in not giving the prescribed notice. The boy died on the 23rd December 1937 at two o'clock in the morning, and the summons was served on the doctor on the 22nd March 1938. The criminal action against the doctor stood, saved probably to the doctor's bitter disappointment, by just a narrow margin. Another question in connection with a charge against a doctor under this section arose in a reported case of 1954 (Vol. XXXVIII, Part IV, pages 786-788 of the Law Reports). The doctor concemed submitted through his counsel that the provision in question was not to be construed as imposing a duty to send the prescribed certificate on *each* doctor having the patient under his care or called to visit him. It was contended on behalf of the doctor that it was sufficient if only one doctor sent the certificate in cases, like the one in question, of a consultation where there was thus more than one doctor involved. The Court – and its view was endorsed by the appellate Court – was unable to accept this contention in view of the clear wording of the law which, after all, was also consonant with the *ratio legis* in as much as otherwise, in the case of a plurality of doctors concerned, each might well rely on the other as to the sending of the certificate with the unfortunate consequence that no certificate might in the end be sent at all.

Enough of this rather unhappy though very interesting subject of criminal prosecutions; I would ask you now to transfer your attention from the dock to the witness-box which, I know, can sometimes seem hardly less unpleasant. In connection with this subject, I should like to refer to a case which, because it is only too recent, has not yet been reported but which may well eventually find its

way into the Law Reports. This the case of **Balzan v Ciantar** which my colleagues and I on the Court of Appeal decided on the 24th November of last year.

No doubt you all know that nowhere are doctors really and truly in fantastic demand as witnesses these days as in Rent Regulation Board cases. You also know that doctors are being continuously asked – I was going to say 'pestered' – to make out certificates attesting that one or the other or both of the parties in a rent case suffer from some disease or preferably from a multiplicity of them as, for the purpose of the assessment of the respective 'hardship' of the parties, the more the diseases listed the greater appears to be the lessor's chance of recovering possession of his building or the tenant's chance of retaining it. Whilst in the old days to call a man 'baswi' very likely led to a case of slander, nowadays the parties in a rent case sport their rupture as if it were a family heirloom. In our procedural system a medical certificate is in principle of no evidential value unless the doctor who subscribed it confirms its contents on oath in the witness-box.

Now in the **Balzan v. Ciantar** case it was contended on behalf of the appellant before us in the Court of Appeal that a doctor's evidence as to the state of health of one of the tenants was merely an *ex parte* expression of opinion. It was stated in the judgment that a doctor having a person under his professional care and called by that person to give evidence on his behalf may be expected to testify, whenever this is relevant to the case, not only on the illness with which that person is affected (which has never attracted any objection), but also on what *that* particular person whose health background is after all normally known only to his personal doctor, should or should not do for the treatment cure or relief of that illness. The doctor testifies on what he himself knows about the patient as such, and this does not relate only to the illness which he has diagnosed, but also to what the patient, in the state of health in which he has been found to be, should or should not do on account of that state of health. Obviously, the Court added, both one and the other of these matters necessarily imply a certain subjective appreciation. But in the circumstances this is in itself inevitable, and, contained within proper limits, in normal circumstances is not procedurally wrong. May I, however, add, by way of a sad postscript to this, that I have at times seen medical certificates which looked elegantly tailor-made for the case, and some even recommended that the patient should have the particular house he was after.

Lastly I should like to say something about doctors as court experts. Mention of doctors as experts is to be found practically everywhere in our Law Reports. In our legal system, as you know, the expert is appointed by the Court itself and I feel that this system has much to commend it. We find doctors as experts in practically all reports of criminal trials on such charges as homicide and bodily harm. In one such case, which was decided by the Criminal Court in 1955 (Vol. XXXIX, Part IV, pages 914-915 of the Law Reports) the accused objected to the word *ċar* (clear) in the phrase *jesponuh għall-periklu ċar tal-mewt* (expose the victim to a clear danger of death) in the medical experts' report, on the ground that it is exclusively for the jury to adjudicate on this factor. The Court, however, overruled this objection on the ground that danger of death admits of certain gradations, ranging from remote danger to clear danger, and in the report this was correlated with the traumatic effect, the study of which is a matter which falls within the technical competence of the medical experts.

In civil matters, too, there are several reported cases relating to doctors as experts. In particular there was a time when the Courts held that it was impossible to entrust experts with the examination of the question of the mental sanity of a person – usually a testator – who was already dead at the time (Vol. XX, Part 1, page 193 and Vol. XXIV, Part 1, page 794 of the Law Reports). But more recently (Vol. XXXIV, Part 1, pages 108 to 133) a different view has been taken.

An interesting case arose in 1947 and is to be found in Vol. XXXIII, Part II, pages 73-74 of the Law Reports. In a case of separation the husband, who was the plaintiff and was alleging adultery on the part of his wife, requested the Court to appoint medical experts to ascertain whether his wife, the defendant, was pregnant. The First Hall of the Civil Court held that in the field of private law the examination of the person of any of the parties for evidential purposes was not provided for and so, in the event of opposition on the part of the person concerned, such examination was not admissible.

A similar case, but with a more modern flavour, occurred in 1952 and is reported in Vol. XXXVI, Part 1 pages 297-298 of the Law Reports. In a case of illegitimate filiation in which the plaintiff was alleging that the defendant was the father of her illegitimate child, the defendant asked the Court of Appeal to appoint an expert to carry out the necessary blood test on the plaintiff in order

to exclude his paternity in respect of the child. The Court held that such a test was admissible whenever the parties consented to it. In this case both the plaintiff and the defendant had in fact consented; but as the mother was appearing in the case also as *curatrix ad litem* of the child, the question arose whether in this capacity she could give her consent on behalf of the child. The Court held that as it was in the child's interest that his paternity be established and it did not appear that the test in question could be prejudicial to his health, it could in the circumstances supply this consent itself. A similar case is at present pending before us in the Court of Appeal and the relevant tests are actually being carried out. This, I think, evinces what I may call a prudent progressiveness in the Courts' approach to certain delicate problems.

Now I should like to draw here a very firm line dividing the first part of my lecture dealing with doctors from the second part concerning would-be doctors. But before dealing with these – and by would-be doctors I mean those who purport to exercise the medical profession without being qualified doctors – I should like to refer very briefly to those who, though qualified doctors, seek to exercise the medical profession without having first obtained the necessary licence to practise medicine in these Islands and (since 1959) being registered in the Medical Register, as provided in Section 4 of the Medical and Kindred Professions Ordinance (Chap 51).

A reported case of a foreign doctor or rather of a Maltese with a foreign medical degree who practised medicine in Malta without the requisite licence came before our Courts in 1939 (Vol. XXX, Part IV, pages 637-641 of the Law Reports). A person with such a Maltese surname as Mifsud, but a graduate of a French University *without a local licence,* practised medicine here and was convicted. He did not appeal against his sentence, but thought he was smart enough to get round it. He made arrangements with a licensed Maltese doctor for the opening of consulting rooms in Strait Street, Valletta and the locally licensed doctor was paid three pounds a week apart from two shillings in respect of every patient, and what was left after deducting expenses went to the man who was referred to as the French doctor. This man was convicted of having contravened Section 4 of the said Ordinance (Chap. 51) and this time appealed against his conviction. The appellate Court held that it had been established in evidence that the man examined patients, made diagnoses and prescribed treatment, and that

this did in fact constitute the exercise of the medical profession. Even if he did this without payment, the offence, of the unlawful exercise of the medical profession would subsist as the purpose of gain was not a necessary ingredient of this offense, this having been established in the earlier case of *Salunto.* Nor did the presence of the licensed doctor alter the position at law for whether by himself or in conjunction with others, this man certainly did contravene the law.

The *Salunto* case referred to in this judgment, also a reported case (Vol. XXV, Part IV, pages 914-917 of the Law Reports), is an interesting one. It refers to a proper quack and a female one – not that female quacks are any worse than male ones. This woman admitted that she cured people by recommending or administering to them such innocuous substances as ordinary purges and that for this she used to get some food or a little money. The Court held that the offence of the unlawful exercise of the medical profession was not negatived by the fact that the substances prescribed or supplied were innocuous (indeed by relying on such supposed cure the 'patient' in fact usually omitted or delayed the *proper* cure) or that the emoluments received were small.

In another reported case (Vol. XXXII, Part IV, pages 918-922 of the Law Reports) a much more serious view was taken of the defendant's misdeeds. A man without any professional qualifications posed as a medical specialist and even assured his 'patients' that they would be cured by him within a specified time, receiving payment for his service. With intent to make gain, he prescribed treatments which were of no benefit whatever to his 'patients'. Moreover, he publicly represented himself as a doctor and even managed to figure as such in the telephone directory. The appellate Court held that this was not a case of a mere violation of the said section 4 of Chap. 51, but that there were in this case all the ingredients of the much more serious crime of *truffa* under section 322 of the Criminal Code, including that *mise en scene* which is typical of this crime. The man was given six months in prison where it is hoped he had occasion to meditate on the long arm of the law and sort out the major from the minor offence.

I do hope you have not found this little guided tour of our *giurisprudenza* uninteresting. I, for one, always feel that there is a ring of reality about decided cases which to me at least is often more appealing than the writing of theoreticians. I do realize that I have often had to focus your attention on those doctors, indeed

extremely few, who have fallen foul of the law and this may perhaps on the whole have appeared to you a little dismal. But it is the dark side of things that brings out more fully the brighter side and the medical profession in Malta has indeed a very bright record. After you have heard all this, I should not like any of you to look upon the law with even the slightest degree of unfriendliness, for may I conclude by saying – and I firmly believe this – that the law is indeed the best friend of an honest man.

DOES 'LEGAL RELATIONSHIP' CONSTITUTE AN IMPEDIMENT TO MARRIAGE IN MALTA?

A. DEPASQUALE

1. NOTION OF 'LEGAL RELATIONSHIP'.

By 'Legal Relationship' we are here understanding specifically that special relationship in law that arises between an adopter and the person adopted by him in any way which, according to the laws of the country, constitutes a true legal adoption. This special relationship lies in the fact that, once legal adoption has truly taken place to the full satisfaction of the law, in the eyes of the law in most respects and almost as a general rule the adopted child assumes the same relationship to the adopter (or adopting spouses) as any child born in lawful marriage bears to his parents.

2. 'LEGAL RELATIONSHIP' IN THE LAW OF MALTA REGARDING MARRIAGES.

The Civil Code of Malta, while regulating the rights and duties arising from validly contracted Marriage together with such other civil effects as filiation and parental authority does not say how Marriage is to be validly celebrated in Malta. It fails to make any provisions either about the formalities required in its celebration or about the essential requisites on the part of the spouses contracting Marriage that could affect its validity.

It is, however, the constant doctrine and practice of our Civil Courts to require that marriages celebrated in Malta between parties of whom at least one is a member of the Catholic Church be